Before the
Federal Communications Commission
Washington, D C 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act – Competitive Bidding For Commercial Broadcast and Instructional Television Fixed Service Licenses	)	MM Docket No. 97-234
	)	
Reexamination of the Policy Statement On Comparative Broadcast Hearings	)	GC Docket No. 92-52
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite The Resolution of Cases	)	GEN Docket No. 90-264

PETITION FOR RECONSIDERATION

J. McCarthy Miller ("Miller") and Biltmore Forest Broadcasting FM, Inc. ("BFB"), by their attorneys, hereby petition the Commission to reconsider in pertinent part the above-referenced First Report and Order issued August 18, 1998 ("Auction Order"). Miller and BFB were Commenters in the notice and comment proceedings which preceded the adoption of the Order. Miller and BFB believe reconsideration is warranted in two discrete respects.

A. Definition of Same Market for Purposes of New Entrant Status is Too Narrow

In newly adopted rule 73.5007(a)(1), the Commission established the criteria for defining the "same area" for purposes of new entrant status. The Commission basically adopted the terms now applicable to the one-to-a-market rule set forth in Section 73.3555(c) of the rules. This particular rule section is contains a particularly circumscribed definition of what constitutes the "same market". Specifically, the proposed contour of an entity must either completely encompass

or be completely encompassed by the Grade A contour (or its AM/FM equivalent) of a TV station owned by the entity. Because complete overlap of contours is required, the rule is obviously less restrictive than a rule banning partial overlaps. This rule applies, however, only in the context of overlaps between AM and FM stations and TV stations in the same market. The more normal rule that defines "same area" status is found elsewhere in Section 73.3555 – subsections (a) and (c). In those subsections, the Commission considers stations to be in the same market if there is any overlap between the city grade contours of the stations (in the case of radio stations) or the Grade B contours (in the case of TV stations).

The latter model seems far more appropriate to the "new entrant" status which the Commission is attempting to establish for auction purposes. The discussion of this rule in the text of the Order is not extensive. Paragraph 190 of the text merely indicates that the new entrant credit is not to be afforded to entities holding certain "local" media interests. Miller and BFB respectfully suggest that a local media interest is one which overlaps another media interest, whether or not the overlap is complete. If overlapping contours were not "local", Section 73.3555(a) would make no sense. Even more anomalous would be the situation of a TV applicant whose existing station had a Grade B overlap with the proposed new station. That applicant would be entitled to a bidding credit as a "new entrant" under the auction rules, yet it would be forbidden under the duopoly rules (73.3555(c) from holding any such station at all!

The best way to make the Commission's rules internally consistent and, at the same time, serve the intended ends of the "new entrant" credit is to treat applicants with any city grade overlap in the case of radio stations or any Grade B overlap in the case of TV stations as being in the same market.

B. Failure to Account for Interim Operations

The Commission's AuctionOrder alluded in several ways to the on-going Biltmore Forest comparative proceeding. That case would be one of the cases which would go to auction under the new rules. The auction rules adopted by the Commission do not account for the Biltmore Forest-type situation. In the Biltmore Forest case, one applicant was awarded the construction permit as a result of the old comparative criteria. Although the grant of its construction permit was later rescinded by the Court of Appeals, the erstwhile winning applicant proceeded to construct and operate the station. Following Commission action to rescind the applicant's operating authority, the Court of Appeals ordered the station to be re-instated on some sort of as yet undefined interim basis. That applicant has been operating the station now since mid-January 1998 and will presumably continue to do so for the indefinite future. Although normal interim operating policies require such operators to operate on a non-profit basis, the Commission has permitted Orion Communications to operate on a profit-making basis for what now adds up to more than three years. By contrast, during the period that a consortium of other applicants was operating the station, they were required to operate the station on a non-profit basis.

The upshot of these developments is that Orion is being permitted to amass a fund which will be available to use in the auction while the other competing applicants have no such advantage. This circumstance substantially undermines one of the fundamental premises of the Commission's new auction rules. At Paragraphs 43 and 56 of the Order, the Commission emphasized that the decision to switch to an auction process was fair because "pending applicants will be bidding only against the competing applicants that have spent the same amount of time, and presumably incurred similar expenses, in prosecuting their applications through a comparative hearing. In this manner, the pending applicants will not be unfairly disadvantaged in the auction as a result of previous expenditures to secure the license." While this is true enough as far as it goes, the fact that one of five competing applicants for Biltmore Forest has been allowed to operate the station for a profit for three years while the other applicants have not creates precisely the financial disadvantage which the Commission disclaimed.

Under all previous policies governing interim operation, the Commission has taken pains to ensure that none of the applicants could use the interim operation to claim a comparative advantage in the contest for the permanent license. Community Broadcasting Co. v. FCC, 274 F. 2d 753 (DC Cir. 1960). For example, work experience gained during interim operation could not be claimed as a credit under the old integration criterion. Any other rule would have directly subverted the most fundamental of all communications doctrines, i.e., that one of several competing applicants may not be placed in a position of advantage while the award is under consideration. Ashbacker Radio Corp. v. FCC, 326 U.S. 327(1945). Here the unique status which Orion has been accorded directly contravenes those longstanding

principles. Orion is being permitted to garner from the radio frequency at issue the very coin which will then become the basis for its comparative preference in the auction: cash. As the D.C. Court of Appeals put it:

> If the grant of one application effectively precludes the other, the statutory right to a hearing which Congress has accorded before denial of their applications becomes an empty thing.

Community Broadcasting Co. v. FCC, 274 F 2d. 753 (DC Cir 1960). By permitting Orion to garner profits and revenue for an extended period, the Commission has given it a huge head start in the auction bidding process which may well be insurmountable. In Community Broadcasting terms, the Commission's action "effectively precludes" the other applicants from any kind of fair opportunity to compete with Orion in the auction. The outcome is a foregone conclusion - precisely the evil that Ashbacker condemned.

Not only does this circumstance violate Ashbacker principles and the "fairness" principle which the Commission articulated in the Auction Order, but it also contravenes former Chairman Reed Hundt's representations to Congress regarding interim operations. In a letter to Senator Lauch Faircloth dated June 7, 1997, Chairman Hundt assuaged the good senator's concerns about possible unfairness stemming from Orion's competitors' *joint* interim operation of the Biltmore Forest station:

> First, this arrangement is temporary and is intended to preserve service to the public while avoiding any actual or perceived favoritism to any party

by treating them all with strict equality. Permitting one of the competing applicants – Orion or any other – to operate the station while the other applicants simply await a Commission decision would be inconsistent with this concept. The courts, in analogous situations, have repeatedly encouraged the Commission to follow this equal treatment approach to avoid prejudice to the rights of the applicants.

Miller and BFBF recognize that it was the Court of Appeals which overruled the Commission and ordained that Orion should be returned to the air. But nothing in the Court's Order required or even suggested that Orion should thereby be permitted to gain a comparative advantage against the other applicants in contravention of Ashbacker and all prior court precedents.

While it would plainly be unlawful for Orion to be permitted to benefit comparatively in an auction from its interim operation, the solution is not entirely clear. We can suggest several options. The most straightforward option would be to require Orion to elect either to continue operating on an interim basis or forego participation in the auction. This approach would be consistent with other interim operating situations in which the Commission forbade interim operators from being contestants for the permanent license. Newark Radio Broadcasting Association v. FCC, 763 F2d. 450, 452 (DC Cir. 1985). (FCC's past experience "demonstrated that permitting an applicant for a permanent license to operate on an interim basis gave that applicant an unfair advantage and prejudiced the outcome of the permanent licensing proceeding.")

Another option would be to require Orion to submit a detailed accounting of its expenses during the period of interim operation. In order to put it on an even keel with the other applicants (as contemplated by the Auction Order), each of the other applicants would receive a bidding credit equal to any profits earned by Orion together with any expenses paid by Orion toward non-operating expenses. It is necessary to include these non-operating expenses in the mix because to look only at profits would not level the playing field. Orion has presumably been funding the army of law firms engaged in its multi-faceted legal, lobbying and fund-raising efforts out of station revenues. The other applicants have all had to dig into their own pockets to fund their on-going legal expenses. Since the premise of the Commission's Auction Order was that all bidders in the auction would be coming from a common background of having had to fund similar expenses in prosecuting their applications, failure to include Orion's funding of its prosecution expenses out of station proceeds would leave the scales seriously unbalanced. If, for example, Orion had generated $100,00 in profits during its three years of operation and spent an additional $200,000 out of station proceeds for legal and lobbying fees, each of the other applicants should begin the auction with a $300,000 credit equal to the comparative advantage Orion has gained by its interim operation. This would eliminate the unfair advantage that its preferred status to date has created.

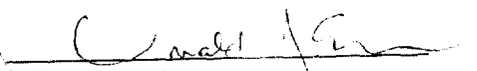
Yet a third option would be to require Orion to admit the other competing applicants to its operating entity. This is, of course, the normal rule applicable to interim operations. See Section 73.3592. Application of this rule here would ameliorate the future advantage which Orion will accrue while the Commission is gearing up for an auction, but it would not, of course, eliminate the advantages already accrued.

While any of these options would operate to eliminate unfairness, the key point here is that it would not only be unfair but inconsistent with Ashbacker and all prior Commission policy to establish an auction procedure which permits an interim operator to benefit by its interim operation to the detriment of the other applicants.

Conclusion

For the reasons set forth above, Miller and BFBFM respectfully request that the Commission reconsider the Auction Order to the extent explained above.

Respectfully submitted,



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October 5, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have on this 5th day of October, 1998, I served copies of the foregoing *Petition For Reconsideration* by first-class mail, postage prepaid, on the following in the above captioned proceeding:

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